No. 82-1667

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE S. LEACH, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES POSTAL SERVICE IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's suit alleging that his employer breached its collective bargaining agreement and his union breached its duty of fair representation was barred by the statute of limitations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 698 F.2d 250. The order of the district court (Pet. App. 13a-18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1983. The petition for a writ of certiorari was filed on April 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 22, 1978, petitioner, then an employee of respondent Postal Service, "entered the Cincinnati, Ohio Post Office while intoxicated and shouted obscenities about his supervisor and two postal security guards" (Pet. App. 2a). One week later he was issued a notice of proposed dismissal for conduct unbecoming a postal employee, effective October 6, 1978 (*ibid.*).

On September 21, 1978, respondent unions filed a grievance on petitioner's behalf seeking his reinstatement (Pet. App. 3a). The Postal Service denied the grievance, and the unions certified the grievance for arbitration. An arbitrator heard the grievance on February 20, 1979, and issued an award adverse to petitioner on February 27, 1979 (*ibid.*). In upholding the Postal Service's discharge of petitioner, "the arbitrator found significant [petitioner's] 'progressively worsening disciplinary history caused by alcoholism' " (*ibid.*).[1]

2. On October 6, 1980, more than 19 months after the arbitrator's decision, petitioner brought this action against respondents in the United States District Court for the Southern District of Ohio. Pet. App. 3a, 23a-29a. Petitioner alleged that the Postal Ser-

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[1] Petitioner's disciplinary record included several warnings and two lengthy suspensions for misconduct. The most recent incident prior to the one on August 22, 1978, involved conduct similar to that for which petitioner was discharged, and was the subject of a grievance settlement that reduced a suspension from 28 to 14 days. Pet. App. 3a. The settlement also required petitioner to participate in the Postal Service's alcohol recovery program and advised him that he would be discharged if further disciplinary action were necessary because of "continued unsatisfactory job performance" (*ibid.*).

vice had discharged him in violation of the applicable collective bargaining agreement (*id.* at 25a, 29a-35a),[2] and that the unions had violated their duty of fair representation by their handling of the grievance and arbitration proceedings (*id.* at 26a, 35a-37a). Petitioner invoked the district court's jurisdiction under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. 185(a) ("LMRA"), as well as 28 U.S.C. 1331(a) and 1339, 28 U.S.C. (Supp. V) 1337, 29 U.S.C. 159(a) and 39 U.S.C. 409(a). Pet. App. 26a.

On respondents' motions for summary judgment, the district court held (Pet. App. 16a-18a) that petitioner's action was time-barred. With respect to petitioner's action against the Postal Service, the court concluded (and petitioner did not dispute (*id.* at 16a)) that this Court's decision in *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), was controlling.[3] Accordingly, the court held that petitioner's action against the Postal Service was barred by Ohio's three-month statute of limitations for actions to vacate an arbitration award, Ohio Rev. Code § 2711.13 (Page 1981). Although the district court noted (Pet. App. 17a) that, in view of Justice Stevens' separate opinion in *Mitchell*, "[i]t is not equally clear that *Mitchell* is controlling with regard to the union

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[2] Petitioner also claimed (Pet. App. 35a) that his discharge was intended as a punishment for his alleged exercise of the First Amendment right to free speech and constituted a violation of that right.

[3] In *Mitchell*, the Court held that the most appropriate state statute of limitations to apply to an employee's Section 301 action against his employer challenging a discharge that was upheld in arbitration was the limitations period for actions to vacate an arbitration award. In that case the applicable New York state statute provided a 90-day limitations period.

defendants," the court concluded (Pet. App. 18a) that Sixth Circuit precedent "compels the application of the same limitation period to actions brought under LMRA against an employee's union as are applied to related actions against his employer." Accordingly, the district court granted the motions for summary judgment of both the employer and union respondents.

3. The court of appeals affirmed (Pet. App. 1a-11a), agreeing with the district court that petitioner's claim against the Postal Service for wrongful discharge constituted a challenge to a final arbitration decision that was indistinguishable from the one involved in *Mitchell*. The court rejected petitioner's contention that his claim against the Postal Service was "not of the 'hybrid-type' claim pursuant to § 301 (a), LMRA," but rather was based on 39 U.S.C. 409(b), and therefore was controlled by the general six-year statute of limitations governing civil actions against the United States contained in 28 U.S.C. (Supp. V) 2401(a).[4] The court explained (Pet. App. 7a-9a) that in passing the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, Congress had patterned the Postal Service's labor relations after labor relations in the private sector under the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.* In particular, the court noted (Pet. App. 8a) that 39 U.S.C.

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[4] 39 U.S.C. 409(b) provides:

> Unless otherwise provided in this title, the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, and the rules of procedure adopted under title 28 for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

1208(b) provides for the enforcement of collective bargaining agreements in federal court. Moreover, the court explained (Pet. App. 8a; footnote omitted):

> This Circuit and our sister circuits have uniformly held that 39 U.S.C. § 1208(b) is an analogue of Section 301(a) of the Labor Management Relations Act of 1957 [*sic*] and have consistently applied § 301 law to suits brought pursuant to 39 U.S.C. § 1208(b).

Accordingly, the court concluded (Pet. App. 9a), "since the courts have applied § 301 case law to Postal Service labor relations cases arising under 39 U.S.C. § 1208(b) and since it is from the § 301 case law that *Mitchell*, *supra*, arose, *Mitchell* is clearly applicable to [petitioner's] action against the Postal Service."[5]

The court of appeals also agreed with the district court (Pet. App. 5a) that while *Mitchell* "does not necessarily cover the unfair representation case against the union," under the law of the Sixth Circuit "the same statute of limitations should be applied to both branches of the labor dispute." See *Badon* v. *General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982); *Gallagher* v. *Chrysler Corp.*, 613 F.2d 167 (6th Cir.), cert. denied, 449 U.S. 841 (1980).

Finally, the court of appeals held (Pet. App. 6a-7a) that *Mitchell* applied retroactively to petitioner's case, which was pending at the time this Court de-

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[5] The court of appeals also rejected petitioner's claim that his discharge was in retaliation for his lawful exercise of First Amendment rights (Pet. App. 9a). Rather, the court agreed with the Postal Service that petitioner was discharged because of misconduct that resulted from his alcoholism and that, in any event, the reason for petitioner's discharge would not affect the applicable statute of limitations (*ibid.*).

cided *Mitchell*. The court noted (Pet. App. 6a) that it "and other circuits, prior to *Mitchell*, had adopted various state statutes of limitations, depending on the peculiarities of the limitations law of the state in question and the arguments of counsel in the particular case." It characterized *Mitchell* as "simply a 'clarification,' an attempt to impose a single policy and a single rule in a legally chaotic situation" (Pet. App. 6a). In the court's view, "*Mitchell* was intended to resolve widespread confusion and conflict in the circuits concerning the applicable statute of limitations in these cases" (*ibid.*). Accordingly, relying on this Court's decision in *United States* v. *Johnson*, No. 80-1608 (June 21, 1982), and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the court of appeals concluded (Pet. App. 6a) that *Mitchell* did not represent "a 'clean break' with the past" and that its retroactive application to petitioner's case would not be "fundamentally unfair or otherwise burdensome."

ARGUMENT

1. On June 8, 1983, subsequent to the filing of the petition for a writ of certiorari, this Court rendered its decision in *DelCostello* v. *International Brotherhood of Teamsters*, No. 81-2386. That case presented two questions not decided in *United Parcel Service, Inc.* v. *Mitchell*, *supra*: (1) whether, with respect to an employee's action against his employer for breach of a collective bargaining agreement, Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), is more appropriate than any state statute of limitations, and (2) what statute of limitations should govern the employee's action against his union for breach of the duty of fair representation. The Court concluded that Section 10(b) "should be the

applicable statute of limitations governing that suit, both against the employer and against the union." *DelCostello* v. *International Brotherhood of Teamsters*, *supra*, slip op. 2.

DelCostello is completely dispositive of this case. As *DelCostello* makes clear, this action is governed by the six-month statute of limitations contained in 29 U.S.C. 160(b). Since petitioner did not bring suit until more than 19 months after the arbitrator's decision, his claim is time-barred.

Contrary to petitioner's assertion (Pet. 6), there is no difference of substance between his action and "the usual situation involving an action by a discharged employee against his union and employer * * * commonly characterized as a 'hybrid Section 301-breach of duty action.' " Rather, this case, like *Vaca* v. *Sipes*, 386 U.S. 171 (1967), *Hines* v *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), *Bowen* v. *United States Postal Service*, No. 81-525 (Jan. 11, 1983), and *DelCostello*, involves an action by an employee against his employer and union, claiming that the employer breached a provision of the collective bargaining agreement and that the union breached its duty of fair representation by its mishandling of the ensuing grievance and arbitration proceedings.

The fact that petitioner's employer was the Postal Service, rather than a private entity, does not affect the applicability of the rule announced in *DelCostello*. As the court of appeals recognized (Pet. App. 8a), Congress patterned the Postal Service's labor relations after labor relations in the private sector. See H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 13-14 (1970). Thus, while postal employees, like other federal employees, cannot strike, the Postal Reorgani-

zation Act provides for binding third-party arbitration of labor disputes (see 39 U.S.C. 1207; H.R. Rep. No. 91-1104, *supra*, at 10, 14-15; S. Rep. No. 91-912, 91st Cong., 2d Sess. 7 (1970)), and for federal court enforcement of collective bargaining agreements (39 U.S.C. 1208(b)). As Justice White noted in *Bowen* v. *United States Postal Service*, *supra*, slip op. 2. n.2 (concurring in part and dissenting in part), an action by a former employee against the Postal Service, as employer, for wrongful discharge, and against the union for breach of the duty of fair representation "technically arises under § 1208(b) of the Postal Reorganization Act, 39 U.S.C § 1208(b), which is identical to § 301 [of the Labor Management Relations Act, 29 U.S.C 185] in all relevant aspects." Since *DelCostello* arose from Section 301 case law, it clearly is applicable to petitioner's action against the Postal Service. See Pet. App. 8a-9a.

Petitioner thus errs in suggesting (Pet. 5-8) that because 39 U.S.C. 409 is *one* source of federal court jurisdiction over suits against the Postal Service, it is the appropriate source of jurisdiction over suits seeking the enforcement of collective bargaining agreements and that therefore, by virtue of 39 U.S.C. 409(b) (see note 4, *supra*), the general six-year statute of limitations applicable to civil actions against the United States controls. Whereas Section 409(a) deals with "all actions brought by or against the Postal Service," 39 U.S.C. 1208(b) is specifically concerned with "suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations."[6] Applying the well set-

[6] Petitioner's contention (Pet. 9 n.2) that 39 U.S.C. 1208(b) cannot be the governing jurisdictional statute because it

tled principle that the more specific provision governs, it is clear that 39 U.S.C. 1208(b) controls suits by Postal Service employees alleging a violation of the collective bargaining agreement. In any event, since Congress clearly intended that a postal employee's rights against the Postal Service under 39 U.S.C. 1208(b) would be equivalent to those of his counterpart in the private sector (see pages 7-8, *supra*), the proviso in 39 U.S.C. 409(b) renders the six-year statute of limitations contained in 28 U.S.C. (Supp. V) 2401(a) inapplicable to petitioner's action against the Postal Service.

2. The rule announced in *DelCostello* v. *International Brotherhood of Teamsters*, *supra*, should be applied retroactively to petitioner's case. As the court of appeals observed (Pet. App. 6a), in the civil context a new decision generally is applied retroactively unless it "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Moreover, even if the "clear break" criterion is satisfied, the court must "go[] on to examine the history, purpose, and effect

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"applies, by its very terms, to actions between the Postal Service and a labor organization, or between labor organizations" already has been rejected by this Court in an analogous context. In *Smith* v. *Evening News Association*, 371 U.S. 195, 200-201 (1962), the Court declined to hold that "[t]he word 'between' * * * refers to 'suits,' not 'contracts,' and therefore only suits between unions and employers are within the purview of § 301" of the Labor Management Relations Act, 29 U.S.C. 185. See also *Bowen* v. *United States Postal Service*, *supra*, slip op. 2 n.2 (White, J., dissenting in part and concurring in part).

of the new rule, as well as the inequity that would be imposed by its retroactive application." *United States* v. *Johnson*, No. 80-1608 (June 21, 1982), slip op. 12-13 n.12. See also *DelCostello* v. *International Brotherhood of Teamsters*, *supra*, slip op. 2 n.2 (O'Connor, J., dissenting).

These considerations suggest that there is no inequity in applying the six-month limitations period recognized in *DelCostello* here. Even assuming that *DelCostello* represents a "clear break" with prior law, *DelCostello extended* the time within which petitioner could have brought suit against his employer beyond that available under prior law. See also *DelCostello* v. *International Brotherhood of Teamsters*, *supra*, slip op. 13-14.[7] Furthermore, contrary to petitioner's suggestion (Pet. 10), at the time of the arbitrator's decision in his case there were no precedents of either this Court or the Sixth Circuit that would have rendered reasonable reliance on the general six-year statute of limitations for civil actions against the United States (28 U.S.C. (Supp. V) 2401(a)).[8] In-

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[7] Although the Court in *DelCostello* (slip op. 6 n.11) did not have to reach the question of the retroactivity of *Mitchell*, Justice O'Connor, in dissent, noted (slip op. 2 n.2) that "*Mitchell* did not represent a 'clear break' with past law." See also *United Parcel Service, Inc.* v. *Mitchell*, *supra*, 451 U.S. at 60-62; Pet. App. 6a-7a.

[8] Even *Smart* v. *Ellis Trucking Co., Inc.*, 580 F.2d 215, 217 (6th Cir. 1978) (emphasis added), on which petitioner relies (Pet. 10), had construed *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), as causing "[t]he timeliness of actions under § 301 [to be] determined by reference to the appropriate *state* statute of limitations." In addition, although the *Smart* court rejected the contention that the timeliness of a Section 301 action against an employer for wrongful discharge was governed by the statute of limitations for actions

deed, the district court indicated (Pet. App. 6a) that petitioner had conceded that *United Parcel Service, Inc.* v. *Mitchell, supra*, which applied the statute of limitations for actions to vacate an arbitration award, governed his case against the Postal Service.

Moreover, any claim that petitioner in fact relied on a six-year statute of limitations as governing his action against the Postal Service would be highly suspect in view of the absence of any comparable statute of limitations that even arguably applied to his action against the unions.[9] Thus, it is extremely unlikely that petitioner would have waited 19 months to bring his action in reliance upon a statute of limitations applicable to only one-half of his suit. Finally, petitioner cannot successfully claim (Pet. 10) that he relied to his prejudice on an unpublished district court order entered almost a year after the arbitrator's decision in his case.[10]

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to vacate or modify an arbitration award (580 F.2d at 219; but see *Hill* v. *Aro Corporation*, 275 F. Supp. 482, 486-487 (N.D. Ohio 1967)), it applied a three-year statute of limitations instead only as a matter of *Michigan* law. Petitioner cannot reasonably have relied on a Michigan statute as governing his action brought in Ohio, and he has not alleged reliance on any comparable provision of Ohio law.

[9] As respondent unions have pointed out (Br. in Opp. 6-7), petitioner's action against them would be barred regardless of which of the following were applied: Ohio's three-month limitation on actions to vacate an arbitral award (Ohio Rev. Code Ann. § 2711.13 (Page 1981)), 29 U.S.C. 160(b)'s six-month statute of limitations, or Ohio's one-year limitations period for malpractice (Ohio Rev. Code Ann. § 2305.11 (Page Supp. 1982)).

[10] Subsequent to this Court's decision in *Mitchell*, the district court in *D'Andrea* v. *American Postal Workers Union* (Pet. 10) reversed itself and held that the employee's action against his employer was barred by Ohio's three-month statute of limi-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1983

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tations applicable to actions to set aside an arbitration award. The Sixth Circuit affirmed. 700 F.2d 335 (1983).

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